In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1313

BANK OF THE SOUTHWEST NATIONAL ASSOCIATION, HOUSTON, IN ITS CAPACITY AS TRUSTEE OF THE MRS. DUNBAR N. CHAMBERS—COMMUNITY ONE-HALF OF ESTATE OF DUNBAR N. CHAMBERS, TRUST, PETITIONER

v.

ROBERT L. PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In 1954, Mr. and Mrs. Dunbar N. Chambers sold stock of the High Point Realty Company to Mr. Frank W. Sharp, receiving a cash down payment, with the balance evidenced by a promissory note payable on or before September 1, 1957 (Pet. 8a). Up to the time of Mr. Chambers' death on October 27, 1956, Mr. and Mrs. Chambers, on joint income tax returns, reported the installments on the note as income from an installment sale, pursuant to Section 453 of the Internal Revenue Code of 1954 and the Treasury

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Regulations thereunder (R. 52, 65, 74; Pet. 8a).[1] In conforming to the requirement that an aliquot share of the over-all gain on the transaction be attributed to each installment, each return showed as gain approximately 84 percent of the installments received during the pertinent period.

As of Mr. Chambers' death, the unpaid principal, and the fair market value, of the Sharp note was $795,957.73. Mr. Chambers' half interest of $397,978.37 in the balance was included in his gross estate for federal estate tax purposes (Pet. 8a). Pursuant to Texas law, petitioner, the executor of the estate, took custody, as a trustee, of Mrs. Chambers' interest in the community property, which included the other half interest in the note. Petitioner, both as executor, and as trustee for Mrs. Chambers, reported on the installment method, consistent with the election made in the 1954 joint return, note payments made during the taxable year ending September 30, 1957.

The remaining balance on the note, $751,472.13, was paid in full on April 11, 1958 (R. 6, 34–35; Pet. 8a). For the fiscal year ended September 30, 1958, petitioner, as executor for the decedent's estate, filed an income tax return for the estate reporting $375,736.07, the estate's share of the final payment, on Schedule D, "Long Term Capital Gains and Losses," as "Installment sale—schedule—$318,904.77" (R. 131). The

[1] "R." references are to the printed record in the court of appeals.

attached schedule had the following elaboration under the heading "installment sale" (R. 139):

Sale of High Point Realty stock

Amount collected—fiscal year ended 9-30-58	$375,736.07
Times percent of gross profit	84.87468%
Gain to be reported	$318,904.79

On the same day petitioner, as trustee, filed a return entitled (Pet. 9a):

> Mrs. Dunbar N. Chambers—community one-half of estate of Dunbar N. Chambers, year ended 9-30-58

This return also had a Schedule D and a separately attached schedule. The schedule listed three items in the same manner as the estate's income tax return.[2] There was, however, no "Installment Sale" reported. Instead, Mrs. Chambers' interest in the final payment under the Sharp note was listed under the heading "Sale of Stock", as follows (R. 127):

Description	Date Acr'd	Date Sold	Sales Price	Basis	Gain or loss
High Point Realty Stock	10-27-56 [date of death]	1958	$375,736.06	$375,736.06	—0—

Nothing in the return indicated that this "sale" reflected receipts from the same transaction that the estate for the same year, and Mrs. Chambers or petitioner on her behalf in earlier years, had reported as an "installment sale". Mrs. Chambers, in her personal

[2] The items are (R. 127, 139):
Sale of breeding herd
Sale of Stock
Contract to sell Brahman herd

income tax return for 1958, in no manner reported the final payment.

More than three, but less than six years thereafter, the Internal Revenue Service determined that Mrs. Chambers had a gain on her half interest in the final payment on the note in the amount of $318,904.77, computed in the same manner as in previous years, consistent with installment sale reporting (R. 151–155; Pet. 9a). The Service assessed an appropriate deficiency against Mrs. Chambers, on the theory that she, rather than petitioner, was the appropriate party to report the transaction. An alternative, inconsistent deficiency was assessed against petitioner, in order to protect the revenues in the event the courts later held that petitioner was the proper reporting party. The deficiency notices were based on the assertion that neither Mrs. Chambers nor petitioner had adequately apprised the Service of the nature and amount of an item in excess of 25 percent of the gross income shown in the return, so that the extended six-year limitations period of Section 6501(e)(1)(A) of the 1954 Code applied to either of them.

Both deficiencies were paid. Petitioner and Mrs. Chambers, after claims for refund were rejected, sued for refunds in the United States District Court for the Western District of Texas (R. 2–19, 156). The District Court granted their motions for summary judgment (R. 197–199; Pet. 20a–22a). The court did not state which of the plaintiffs was the proper reporting party; it held that neither return failed to disclose an item of gross income in excess of 25 percent

of the gross income shown on the return, so that the extended limitations period did not apply to either.

The court of appeals reversed as to petitioner. Assuming, but not deciding, that petitioner was the proper reporting party, it held the six-year period applicable; the correctness of this decision is the only question presented here.

The decision below is correct. There is no conflict in decisions or other reasons warranting further review.

1. Section 6501(e)(1)(A) of the 1954 Code provides the Treasury with a six rather than a three-year period for assessing additional taxes "[i]f the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return * * *." The statute further provides (Section 6501(e)(1)(A)(ii)):

> (ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, *in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item.* [Emphasis supplied.]

It is abundantly clear that the tax return petitioner filed on behalf of Mrs. Chambers was not "adequate to apprise the Secretary * * * of the nature and amount" of her half share of the final payment on the Sharp note. The most glaring defect was in petitioner's identification of the transaction as a straight sale of stock, occurring in 1958, with basis and selling

price equal and no gain reportable. The underlying transaction was, of course, the receipt in 1958 of the final payment on an installment sale of stock occurring in 1954—the earlier receipts on which had been reported as amounts 84 percent of which was long term capital gain, in accordance with the explicit requirements of the installment reporting Regulations, Section 1.453–8(b). As the court of appeals pointed out (Pet. 14a–15a), on the very same day petitioner filed the return in question it also filed a fiduciary return for the estate of Mrs. Chambers' husband. Both returns were prepared by the same accounting firm. The estate return specifically listed the other one-half of the final payment on the note as an "installment" sale receipt in accordance with the controlling statute and Regulations. As the very difference in the language of the return filed on Mrs. Chambers' behalf shows, that language put "the Commissioner * * * at a special disadvantage in detecting" the error of reporting, *Colony, Inc.* v. *Commissioner,* 357 U.S. 28, 36, the type of circumstance to which Congress intended to apply the extended limitations period.[3]

2. This case is not in conflict with *Colony, Inc.* v. *Commissioner, supra.* In *Colony,* both the amount of gross receipts and true nature of the transactions—gross receipts from certain land sales—were disclosed on the return, even though the basis of the land was

[3] Notably petitioner's return was lying unchallenged at the same time the government was challenging an identical transaction, reported as an "installment" payment, in *Bath* v. *United States,* 211 F. Supp. 368 (S.D. Texas), affirmed 323 F. 2d 980 (C.A. 5) (See Pet. 15a).

overstated. Here, on the other hand, the critical fact that the item represented receipts from the collection of a note evidencing an installment sale was not disclosed on the return, and this in turn forestalled a determination of the amount properly to be reported as gain. Thus, unlike *Colony*, the return here lacked the minimum information necessary for the Commissioner to ascertain even the proper legal rule governing the tax treatment of the transaction.

This factual difference is particularly significant in view of this Court's observation in *Colony* (357 U.S. at 37), while applying Section 275(c) of the Internal Revenue Code of 1939, that the conclusion reached was in harmony with the successor provisions of Section 6501(e)(1)(A) of the 1954 Code. The 1954 provision added Section 6501(e)(1)(A)(ii), p. 5 *supra*. As the court of appeals held (Pet. 16a), the enactment of this subsection made it apparent that the extended period applies "where there is * * * misstating of the *nature of an item* of income" which places the "commissioner * * * at a special disadvantage in detecting errors." [Emphasis supplied.] In *Colony*, the return properly identified the nature of an item of gross receipts as a "sale". Here, in contrast, the identity of "sale" given the item in question was plainly incorrect.

3. The decision in no event warrants review in this Court because the adequacy of the disclosure on petitioner's return arises against a highly unique factual background that is not likely to recur, so that a decision here is unlikely to have general importance in the administration of the tax laws.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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